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Nos. 80-1798, 80-1808 and 81-91

# In the Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
*Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
*Respondent.*

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
*Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
*Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF FOR THE PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

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## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit misinterpreted this Court's decision in Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) by concluding that it authorized imposition of top-down organizing restraints upon third parties whenever the restraints are imposed in the context of a collective bargaining relationship.

2. Whether the United States Court of Appeals for the Ninth Circuit erred in holding that the construction industry proviso to 8(e) immunizes all subcontracting restraints imposed in the context of a collective bargaining relationship.

3. Whether Congress intended to confine the scope of the construction industry proviso of 8(e) to those circumstances

where there was potential for jobsite friction between union and nonunion workers.

4. Whether the Ninth Circuit misinterpreted this Court's holding in National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967) by promulgating a mixed motives test.

5. Whether 8(b)(7)(C) may be applied to prohibit organizational or recognitional picketing solely where a 9(a) election could be conducted.

6. Whether this Court should reconsider its holding in National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967), which held that a primary-secondary litmus test was to be employed to determine the lawfulness of a subcontract clause.

LIST OF PARTIES

NATIONAL LABOR RELATIONS BOARD

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.*

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 701

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

WOELKE & ROMERO FRAMING, INC.

CARPENTERS LOCAL NO. 944

CARPENTERS LOCAL NO. 235

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*Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. is an affiliate of the Associated Builders and Contractors, Inc.

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Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America (Donald Shriver, Inc. and Sullivan-Kelly & Associates), 239 NLRB No. 42 (1978), 635 F. 2d. 859 (D.C. Cir. 1980) . . . . . 53

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Conference Report 1147 . . . . . 40

Final Report of Select Comm., p. 3, 61 - 62 . . . . . 27

House Report Number 741, 86th Cong., 1st Sess. 39 - 40 . . . . . 40

I NLRB Legislative History of LMRDA, 943 . . . . . 40

II NLRB Legislative History of LMRDA of 1959, 1433 (3) . . . . . 40

Labor Relations Yearbook (1976) . . . .47,48, 49,60,61

Landrum-Griffith Bill . . . . . 40

Public Law 95-486 . . . . . 9

Roberts, Dictionary of Industrial Relations, Revised . . . . . 52

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IN THE SUPREME COURT OF THE UNITED STATES

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OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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# BRIEF FOR THE PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

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## OPINIONS BELOW

The opinion of the limited en banc panel of the Court of Appeals for the Ninth

Circuit is reported at 654 F.2d 1301. (Jt. App. I p. 63-119).[1] The Opinion of the three Judge panel of the Court of Appeals for the Ninth Circuit is reported at 609 F.2d 1341 (1979). (Jt. App. H pp. 48-62). The Decision and Order of the National Labor Relations Board is reported at 239 NLRB No. 43. (Jt. App. G pp. 32-47).

## JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered and filed on the 17th day of April, 1981. The Petition for a Writ of Certiorari was filed on April 29, 1981, and granted on October 5, 1981 (Jt. App. J p. 110). The

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[1]This designation is to the second volume of the Joint Appendix and all references hereinafter are to the second volume of the Joint Appendix.

jurisdiction of this Court rests on 28 U.S.C.A. 1254(1).

## STATUTES INVOLVED

The relevant provisions of Sections 7, 8(a), 8(b), 8(e), 8(f), and 9(a) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq) are set forth in Appendix D to the Petition for Certiorari. (Pet. App. D, pp. A-183 - A-186).

## STATEMENT OF THE CASE

### A. Facts.

Preliminary Remarks.

The parties filed a stipulation of facts with the NLRB. As will subsequently appear, it is the effect to be given to these facts which raises the issues presented here.

The Parties.

AGC[2] is an association of employers engaged in all types of construction in the states of Oregon and five counties of southwest Washington. (Jt. App. E pp. 8-12). The employer members delegate their collective bargaining authority to AGC for the purpose, inter alia, of negotiating and entering into collective bargaining contracts with various unions.

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[2]Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.

AGC has approximately 200 member contractors.

Engineers[3] is a labor organization which represent individuals in the construction industry who perform contractually defined work under various labor agreements, including that with AGC. Its jurisdiction is generously defined by the collective bargaining agreement as follows:

> "assembly and/or disassembly in the operation of all equipment within the jurisdiction of the union, regardless of its use or whether such equipment is mechanically, electrically, electronically, hydraulically, automatically or remotely controlled."

It extends to all heavy highway work, building work and also to off-site work at quarries, asphalt plants, etc.

Petitioner[4] is an organization of contractors whose members are both union and

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[3]International Union of Operating Engineers, Local 701.

[4]Pacific Northwest Chapter of the Associated Builders and Contractors, Inc.

non-union. One of its organizational purposes is to extend the concept of merit shop, i.e., the opportunity of union and non-union contractors to bid upon and work on jobs based exclusively upon price, quality and service and without discrimination of any sort.

The Contract.

The Collective Bargaining Agreement contains the following provisions:

"ARTICLE VIII

"Subcontractors and Other Employers

"Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

"* * * * * *."

The agreement required AGC, and all other signatory employers, to acknowledge Engineers as the sole and exclusive representative of employees covered thereunder; and compelled all employees to become members of the union not later than the eighth day following commencement of employment or be terminated (Jt. App. F p. 16).

B. Procedural Background.

Petitioner filed charges on April 26, 1977, against the Engineers and AGC. The charges alleged that the Engineers and AGC entered into an agreement containing a clause which prohibited subcontracting to all non-signatory employers and that such clause violated Section 8(e) of the National Labor Relations Act. General Counsel's Office issued a complaint; the parties stipulated to the facts; and the matter was transmitted directly to the Board for decision. (Jt. App. A p. 1, B pp. 2-5, C p. 6, D p. 7, E pp. 8-12).

On November 13, 1978, the NLRB rendered its decision and order in this and related cases. It held that subcontracting clauses were immunized from 8(e) scrutiny by reason of its self-contained construction industry proviso. It further held that such provisions may not be enforced through self help. (Jt. App. G pp. 32-47).

Petitioner filed its petition with the United States Court of Appeals for the Ninth Circuit (herein "Court of Appeals") for review of this decision and order as did AGC and the Engineers and the Board cross-petitioned for enforcement.

The Court of Appeals consolidated, for purposes of oral argument and decision, the proceeding brought by the petitioner herein with Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Woelke &

Romero Framing, Inc.), 239 NLRB No. 40 (1978). A three-judge panel of the Court on December 26, 1978, held that the subcontracting clauses were unlawful and further that self-help could not be utilized to enforce such provisions. (Jt. App. H pp. 48-62).

Thereafter, the NLRB and the Engineers petitioned for rehearing en banc. The Court granted this motion and ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1632 and Rule 25 of the Court.

On April 17, 1981 the Court of Appeals rendered its opinion reversing the panel and entered judgment affirming the decision and order of the NLRB. (Jt. App. I, pp. 63-109).

## SUMMARY OF ARGUMENT

This case involves whether an agreement between a group of general con-

tractors and a union to boycott all nonunion contractors violates the National Labor Relations Act. This agreement permits systemic discrimination against employees who have elected to exercise their Section 7[5] right to "refrain" from representational activities. Given historic hiring hall abuses, it has the further effect of exascerbating proscribed activity under Title VII.[6]

Not only do the workers suffer, the consumer suffers as well. The wholesale exclusion of qualified subcontractors from jobsites has, in simple economic terms, a tendency to limit competition and thereby to artificially escalate costs. The consumer pays or does without.

Employers similarly suffer. The nonunion employer is placed in the dilemma

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[5] 29 U.S.C. § 157 (herein Section 7).

[6] 42 U.S.C. § 2000(e) et seq.

of violating his employees' Section 7 rights or of being boycotted from performance of substantial work opportunities. The union general contractor is precluded from utilizing subcontractors of his own chosing with consequent potential losses of production efficiency and increased cost. If the Court is free to make a normative judgment in this matter, the subcontracting restraints should be declared unlawful.

The Court of Appeals decision is in conflict with this Court's decision in Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975).[7] Connell held that the construction industry proviso was to be narrowly construed; that any subcontracting provision which was more restrictive than the objective of the Act would support

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[7]Hereinafter referred to as Connell.

violated 8(e)[8]; and that Congress merely intended to declare as lawful those subcontracting provisions which foreclosed jobsite friction created by shoulder-to-shoulder contact of employees of union and nonunion employers. The subcontracting restraints in this case do not satisfy the Connell standards.

## ARGUMENT

### A.

### The Normative Judgment

The Court of Appeals decision vests a brutal top-down organizing tool in the hands of construction industry unions. It will have an overt and obvious effect upon the rights of employees bestowed by Section 7 of the National Labor Relations Act (NLRA).

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[8] 29 U.S.C. § 158(e) hereinafter referred to as 8(e).

That section grants to employees the right to "refrain" from collective bargaining activities. If the employer of non-union employees can be compelled to enter into a collective bargaining agreement because of the coercive economic impact that subcontracting restraints will have on his business, then Section 7 rights of employees have effectively been destroyed. They have lost their right to "refrain".

Secondly, the effect of the decision is to create a significant impediment to exercise by employees of their electoral rights guaranteed under Section 9[9] of the NLRA. If an agreement is executed outside the 8(f)[10] shelter,[11] the employee must act quickly or otherwise, through application of contract bar,[12] he will forfeit a right to

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[9] 29 U.S.C. § 159 hereafter Section 9.

[10] 29 U.S.C. § 158(f) hereafter 8(f).

[11] NLRB v. Ironworkers Local 103, 434 U.S. 335 98 S. Ct. 651 (1978).

[12] Vincent v. Carpenters Local 1545, 286 F.2d 127 (Cal. 1960).

freely select representation. If the agreement is executed within the protective fold of 8(f), then an employee must petition for an election. The number of construction industry employees who are familiar with the idiosyncracies of 8(f) as it relates to Section 9 rights is miniscule. The effect, therefore, of the Court of Appeals decision, is to destroy Section 9 rights.

The effect on nonunion contractors is straight forward. They face the perfect dilemma. If they remain nonunion, they can expect to be boycotted by in excess of 200 general contractors doing business in the states of Oregon and Washington. Few can survive the economic effect of that juggernaut. On the other hand, if they succumb to the economic reality of the situation and execute a collective bargaining agreement with a union, they deprive their employees of Section 7 rights.

"Wrong" union contractors are placed in an even more precarious circumstance. They are bound by a collective bargaining agreement to a different union claiming jurisdiction over the same work. This employer therefore must consider violation of 8(a)(5) and repudiation of the employees' selected representative, or face the prospect of an early economic demise.

The consumer should not be forgotten in this review of the effects that flow from the Court of Appeals decision. Common economics dictates that the greater the number of competitors for available work, the lower the price will be to the consumer. The correlative principle is that artificial restraints limiting entry into competition are interdicted as per se violations of Section 1 of the Sherman Act, their effect being so pernicious in form as to permit no explanation or justification. Klor's, Inc. v. Broadway-Hale, Stores, Inc., 359 U.S. 207

79 S. Ct. 705 (1959). Clearly the consumer has an economic stake in this matter.

The effect of the boycott of nonunion and wrong union contractors upon the consumer is not merely economic. The quality of service may also suffer. Union subcontractors do not have a monopoly on provision of skilled services. One might argue precisely to the contrary.

Not even union contractors escape the negative effect of this decision. Reduction in the number of qualified bidders may effect the margin of profitability on a job. Swollen bids produced by too few contractors submitting supportive bids may also compel the owner not to build and therefore an economic opportunity to the union general contractor and to his employees will be lost.

Can this decision therefore be justified on any basis? The NLRB proffered none based upon its expertness in the labor

field. Rather, it limited its consideration to a mechanical, almost statutory construction, analysis of this Court's Connell case.

The Court of Appeals fabricated, from whole cloth, supposedly pragmatic justifications for the holding. It urged that limiting enforcement of subcontracting agreements to instances when jobsite friction will arise, creates immense practical problems. The problems identified were those associated with jobsite-by-jobsite negotiations; policing compliance; and potential for jobsite disruption. (Jt. App. I pp. 96-98).

At no time has this petitioner contended that there should be "jobsite-by-jobsite" negotiation of collective bargaining agreements. It is a simple matter to write a collective bargaining agreement to conform to the objectives of the proviso. There is no logical reason why the duration of such an agreement must be limited to a

specific project. It, like others, could be written for an extended term.

The Court of Appeals also found pragmatic justification for subcontracting restraints because of the difficulty in policing jobsites to determine whether there was "any union worker" on the jobsite at any time and because of friction created by union and nonunion contractors working side by side. These contentions are plain nonsense.

The issue is not whether "a nonunion member" is present. Rather, a member of a union may work for a union or a nonunion contractor. The fact of membership in a union does not foreclose working for a nonunion contractor. Free choice is one of the underlying tenets of the Act. The problem, then, is commingling of union members employed by a contractor privy to a collective bargaining agreement with a union and the employees of a nonunion contractor. This is the theoretical caldron of boiling oil.

Typically unions call for and have pre-job conferences with the general contractor. During the pre-job conference the identity of each subcontractor is disclosed. The critical path schedule and projected timing of the presence of each subcontractor on the jobsite is disclosed. The employer may be requested to give the union specific written advance notice of when nonunion contractors will be present. Thus the union knows or has the means to know when a nonunion contractor will be present on the jobsite.

This system also prevents shoulder to shoulder job site friction between employees of union and nonunion contractors. Common situs picketing is proper only when the employees of the primary employer are present.[13] These employers are thus sched-

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[13] Carpenters, District Council of Milwaukie & Vicinity, 196 NLRB 487, 490, No. 60, 80 LRRM (1972), Local Union No. 519, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting

uled to work at different times on the job site.

Nonunion contractors may, for example, work swing shift or weekends when employees of union contractors are not present. Thus avoidance of jobsite friction and of the effects of informational picketing upon neutral employers has produced a practical convention which may be applied, without change, to subcontracting with nonsignatory subcontractors.

Besides the prejob conferences which disclose to the union when nonunion contractors will be present at the job site, construction industry unions have historically policed the jobsite for a variety of purposes. One purpose has been compliance with the labor contract. The second has been to ascertain whether a nonunion contractor is working at times other than those

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[13](Cont.) Industry of the United States and Canada, AFL-CIO, 416 F.2d 1120 (C.A. D.C. 1969).

set forth in the critical path schedule. A declaration that subcontracting restraints in the AGC/701 agreement were unlawful would not change this "policing" aspect of their long-standing relationship one iota.

Even if escalated policing were required, what does this mean? It suggests the absence of friction at the jobsite. It suggests that employees of union and nonunion companies can and do work side-by-side without antagonism. It appears, however, that this conclusion may be legislatively foreclosed and it must therefore be conclusively presumed that mixing of oil and water at the jobsite will indeed produce immediate input to the union from enraged union workers and an appropriate response given.

Each of the factors enumerated above counsel that the Court of Appeals' pragmatic judgment was wrong. Normative factors, on the other hand, overwhelmingly favor a declaration that restraints on

subcontracting be declared unlawful. Each sector of the economy is injured and no pragmatic labor law consideration served.

The question then, is whether the language of the statute, the legislative history, or the Connell decision foreclose a decision which comports with common sense and everyday economic judgments.

B.

LANGUAGE OF STATUTE

The literal language of 8(e) is unambiguous. (Pet. App. D 184). It prohibits entry into any agreement which requires an employer not to do business with any other person. Second, the construction industry proviso to 8(e), states that the section shall have no application to an agreement between a union and an employer in the construction industry.

This Court has instructed not to be trapped into a literal interpretation of this section. Some, but not all, agreements restricting subcontracting fall within its scope. More particularly, in National Woodwork Manufacturers Association v. NLRB, 87 S. Ct. 1250, 386 U.S. 612 (1967) the Supreme Court held that there must be some showing that the objective of the tainted agreement is secondary.[14] The Court commenced its analysis by reciting the

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[14]The Court held that the intended scope of 8(e) should be judged solely by reference to the breadth of 8(b)(4)(A). It concluded that since 8(b)(4)(A) dealt exclusively with activities having a secondary objective that ipso facto a similar interpretation must be given to 8(e). This decision (4-1-4) was met with a sharp dissent. Justice Stewart commented:

> "The Court undertakes a protracted review of legislative and decisional history in an effort to show that the clear words of the statute should be disregarded in these cases."

The dissent's reading of the legislative history demonstrated that it was not the intent of Congress to compel a showing of a secondary objective. There is a substantial argument that the dissent was correct in its analysis of the congressional purpose in the enactment of 8(e). The absolute phrasing of the

> "* * * 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' * * *"

It is further recognized that this principle had particular application to labor legislation which is

> "* * * to a marked degree, the result of conflict and compromise between strong contending forces. * * *"

This Court also has interdicted a literal interpretation of the construction industry proviso to 8(e). In Connell, it held that some construction agreements between a labor organization and an employer are not immunized from 8(e) scrutiny even though confined to jobsite relations.

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[14](Cont'd.) language and the background against which it was enacted strongly suggest that a primary versus secondary dichotomy was not desired nor anticipated. It appears probable that the congressional intent was to regulate contracts, be they of a primary or secondary objective in industry generally and to proscribe only secondary objective agreements in the building and construction industry by enactment of the proviso.

It thus becomes essential to define the congressional purpose from sources extrinsic to the literal language of the proviso in order to determine which agreements are governed by the proviso.

C.

Legislative History

Congress has promulgated a national labor policy. The centerpiece of this policy was Section 7 of the Wagner Act, which originally provided:

> "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

When the Second World War ended, a well-directed campaign to amend the Wagner Act gained momentum. The intervening years had demonstrated a need to regulate jurisdictional disputes and a need to regulate

practices by unions and not merely employers. In response Congress made structural changes in the National Labor Relations Board; enacted Section 8(b), inclusive of six unfair labor practices[15] directed against unions; adopted a free speech proviso[16]; defined parties' collective bargaining duties[17]; granted employees the right to petition for decertification[18]; granted employees the right to petition for a deauthorization election to free themselves from the umbrella of a union security agreement[19]; and finally, amended Section 7 to explicitly state that employees had the right to "refrain" from collective bargaining and self-organization.

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[15] 29 U.S.C. § 158(b)(1) through 29 U.S.C. § 158(b)(6) (hereinafter referred to as Section 8(b)(1) through Section 8(b)(6).

[16] 29 U.S.C. § 158(c).

[17] 29 U.S.C. § 158(d).

[18] 29 U.S.C. § 159(c).

[19] 29 U.S.C. § 159(e).

The theme of these modifications was two-fold. First, to create a balance of power between management and labor which had not existed under the Wagner Act. Second, to grant substantial power to employees to control their own destiny by declaring it to be an unfair labor practice for a union to restrain or coerce employees in the exercise of their Section 7 rights and by furnishing employees with access to the electoral process.

In 1957 the Senate Select Committee on Improper Activities in Labor or Management Field commenced hearings. Chaired by Senator McClellan, the Committee investigated alleged wrong-doing in the labor-management field.[20] An important part of their investigation was "top-down" organizing techniques which were flatly condemned.[21]

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[20]Cox, Law and the National Labor Policy, 18 (1960), S. Res. 74, 85th Cong., 1st Session.

[21]Final Report of Select Com. p. 3, 61-62.

As a direct product of these investigations, and the public clamor aroused by them, Congress enacted the Landrum-Griffin Act. Restraints against secondary boycotts were tightened; 8(b)(7) was enacted to prohibit picket or other coercive actions calculated to compel an employer to accept a collective bargaining relation with a minority union[22]; 8(e) was enacted to outlaw agreements, a by-product of which was indirect coercion of employees of third parties to accept representation; and finally special permission was granted to execute prehire agreements in the construction industry.[23]

A primary intent of the Landrum-Griffin Act was to strike harshly at coerced imposition of minority representation upon bargaining unit majorities. Thus the Act

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[22]29 U.S.C. § 158(b)(7) (hereinafter referred to as Section 8(b)(7).

[23]Section 8(f).

struck down coercive methods employed by unions to effectuate top-down organizational objectives. It also precluded employer acquiescence which had the same effect. The right of an employee to free choice in an atmosphere free from contractual or economic coercion was thus guaranteed.

Common sense dictates that Congress intended the construction industry proviso to 8(e) to be construed narrowly and solely with a view toward relevant differences between the construction industry and industry generally.

There are three such differences. First, projects frequently are of a short duration; second, there is an enhanced concern about nonunion contractors competing with the advantage of lower wages and fringe benefits; and finally, there is the problem that may be created from commingling of union and nonunion employees at a common jobsite.

The construction industry is marked by its transitory nature. Jobs may be of short duration. The employees shift from employer to employer as work availability changes. There are unique problems in determining whether it is appropriate for an employer to grant recognition.[24]

From an employer's vantage point, it is important to be able to enter into a lawful collective bargaining agreement which sets forth terms and conditions of employment for employees currently on its staff and those to be hired as a result of successful bidding on future projects. A need to project labor costs prior to the time a stable, representative work force came into being was critical. To satisfy these differences, a limited immunity from the provi-

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[24] Trammell Construction Company, Inc., 126 NLRB No. 163, 45 LRRM 1489 (1960); M. B. Kahn Construction Co., 210 NLRB No. 166, 86 LRRM 1319 (1974); Temple Associates Inc., 161 NLRB No. 144, 63 LRRM 1479 (1966).

sions of 8(a)(1) and (2) and 8(b)(1)(A) was necessary. Bricklayers Local 3, (Eastern Washington Builders, Chapter of AGC), 162 NLRB No. 46, 64 LRRM 1085 (1966). 8(f) was enacted in response. It granted immunity to employers and to unions in the construction industry to enter into collective bargaining agreements even though the union had failed to establish or in fact lacked majority status. Agreements entered into under the shelter of 8(f) are voluntary. Agreements coerced through picketing are outside its scope.[25] No element of economic leverage is to be present. The resulting 8(f) agreement is unique. Until or unless the union obtains majority status, it is unenforceable. NLRB v. Iron Workers, Local 103, supra.[26]

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[25] See Footnote 11, p. 13, at note 10. Sperry v. Local 562 etc., 210 F. Supp. 743 (1962) and NLRB v. Local 542, International Union of Operating Engineers, 331 F.2d 99 (3rd. Cir. 1964).

[26] See also Dee Cee Floor Covering, 97 LRRM 1072, 232 NLRB No. 72 (1977).

In granting this special statutory exemption to the construction industry, Congress did not intend to trample upon rights of construction industry employees. It was obviously concerned that there might be an erosion of their right to be free from representation by a particular or any union. In consequences, Congress explicitly granted these employees permission to file a petition for decertification notwithstanding the NLRB's time-honored contract bar rules. Furthermore, Congress explicitly granted employees the right to file a petition for deauthorization. Such a petition has the effect of expunging a seven day union security clause for any prehire agreement. In the one circumstance, construction industry employees would be free of representation and in the other, of compelled membership in a union not of their own choosing. The tools to exercise freedom of choice were

thus left squarely in the hands of the employees.

The 8(f) solution is complete in itself and does not depend in whole or in part for its vitality upon 8(e) or the proviso thereto. The unique problems associated with the construction industry relating to its transitory nature and the difficulty of applying traditional Section 9 principles, were solved exclusively by 8(f).

The second difference, i.e., competition against employers utilizing substandard wages, is equally not the basis for distinguishing the construction industry from other industries.

In 1959 union standards provisions were deemed secondary and not primary.[27] In

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[27]There are two types of restraint on subcontracting. The first is a "union signatory" clause. Under such subcontracting restraint, the employer may deal solely with an employer who has contracted to adhere to each and every term of a collective bargaining agreement, including both its economic and its noneconomic provisions.

consequence 8(4)(b) prohibited coercion to obtain such a provision. See Teamsters Union ( Wilson & Co., Inc.), 143 NLRB No. 117, 53 LRRM 1475 (1963); Truckdrivers Union Local 413 (Patton Warehouse, Inc), 140 NLRB 1474, 52 LRRM 1252 (1963).

The Board reversed itself and held that union standards clauses are primary and therefore did not violate 8(e). Highway Truckdrivers and Helpers, Local 107 ( S.E. McCormick, Inc.), 159 NLRB No. 1, 62 LRRM 1224 (1966).

If Congress intended, as indeed it may, by the 8(e) proviso, to declare only that union standards clauses were lawful, which the abtruse legislative history would

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[27](Cont'd.) The second type of restraint is what is known as a "unions standards" agreement. Under the terms of this type of restraint, a subcontractor can be employed only if it matches the economic provisions of the industry's area collective bargaining agreement. This latter category of agreement contains no compulsion to join any union but merely assures that competition between contractors will not be based upon substandard wages and/or working conditions.

support, then the union signatory clause here is unlawful. On the other hand, if Congress intended merely to recognize wage competition as the basis for distinguishing between this industry and others, declaring a union signatory clause lawful would go far beyond that limited objective.

The third difference between the construction industry and industry generally is the thrusting together of employees on a common jobsite. Congress may have anticipated that commingling of union and nonunion employees created potential for friction or conflict. It thus desired to grant immunity to the construction industry employer and unions to enter into hot cargo provisions in order to prevent jobsite friction from frustrating completion of a project. Exclusion of nonunion or wrong union employers and their employees from jobsites <u>at times</u> when the general contractor's employees were present would accomplish this objective. It

would not be necessary to grant special permission to enter into hot cargo agreements as to times or places when nonunion or wrong support, then the union signatory clause here is unlawful. On the other hand, if Congress intended merely to recognize wage union contractors' employees are absent from a common jobsite. Picketing or other economic activities directed at employees of an absent employer constitute a secondary boycott.[28] The Board in the implementation of its Moore Dry Dock Standards[29] recognized and approved

> "the use of reserve time schedules during which the primary was scheduled to work on a common situs on the ground that they serve to isolate and restrict the labor dispute of the parties immediately involved so as not to unnecessarily enmesh neutrals."

Operating Engineers, Local 450 ( Linebeck

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[28] See Footnote 13, p. 19.

[29] Sailors' Union of the Pacific, (Moore Dry Dock Co.), 92 NLRB No. 93, 27 LRRM 1108 (1950).

Construction), 219 NLRB No. 133, 90 LRRM 1104. Picketing at times when the primary employer is present but all other employers absent would be inconsequential as the employees of the nonunion or wrong union employer would not respect the picket. Linoleum & Carpet Layers Local 1236 (Cascade Employers Association), 180 NLRB 241, 73 LRRM 1159 (1969). It is thus commonly recognized that union and nonunion contractors can work on the same project without fear of disruptive picketing so long as they are scheduled to work at different times. It is respectfully submitted that Congress intended the construction industry proviso to furnish 8(e) immunity only at times and places where common site picketing would disrupt completion of a construction project.

This analysis of the legislative intent has found substantial judicial support in Essex County and Vicinity Dist. Council of Carpenters, Inc., etc. v. Nation-

al Labor Relations Board, 332 F.2d 636 (3rd. Cir. 1964) wherein it was stated:

> "* * * This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside nonunion men on the same project. * * *"

Drivers, Salesmen, etc. Local Union No. 695 v. NLRB, 361 F.2d 543, 553 (U.S. App. D.C. 1966).

The Ninth Circuit recently confirmed that a purpose of the proviso was intended

> "* * * to alleviate the frictions that may arise when union men work continuously along side nonunion men on the same construction site." ACCO Construction Equipment, Inc. v. NLRB, 511 F.2d 848 (1975).

The Court held:

> "* * * What appears critical is that the potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with the union craftsmen." Ibid 851

The Court went on to state that:

> "* * * What is analytically fundamental to the proviso is whether union and non-union laborers will be required to work together for more than brief periods of time."[30]

See also, International Union of Operating Engineers, Local 542 (York County Bridge, Inc.), 216 NLRB 408, No. 67, 88 LRRM 1405 (1975), enforced, 532 F.2d 902 (3rd. Cir. 1976). The potential for jobsite friction does not justify a union signatory clause. It is a simple matter to draft a provision which limits the right of a union contractor to utilize nonunion subcontractors at times and places when its own employees performing work at the jobsite within the jurisdictionally relevant craft.

In recognition that neither the overall legislative history nor the material differences between the construction industry and industry support union signatory subcontract clause, the NLRB resorts to

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[30]Footnote 8, 571 F.2d at 851.

isolated statements made by Senator Kennedy speaking from the floor about modifications made in the Conference Committee. II NLRB, Legislative History of LMRDA of 1959, 1433(3); I NLRB Legislative History of LMRDA 943.

Unfortunately there is no backdrop for these remarks. Senate Bill 1555 and the Landrum-Griffith Bill had very little in common as passed by the respective houses. The construction industry proviso was in neither version of the Act prior to conference.[31]

The probative value of these remarks in assessing the legislative intent of Congress was considered and rejected in Connell:

> "The provisos exempting the construction and garment industry were added by the Conference Committee in an apparent compromise

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[31]House Report Number 741, 86th Cong., 1st Sess. 39-40, Senate Report Number 187, 86th Cong., 1st Sess., Conference Report 1147.

> and the Senate Bill, which prohibited them only in the trucking industry. Although the garment industry proviso was supported by detailed explanations in both houses, the construction industry proviso was explained only by bare references to 'the pattern of collective bargaining' in the industry." Ibid 628

The Court refused to give weight to the remarks of Senator Kennedy and rather gave careful consideration to the overall purposes underlying enactment of the Landrum-Griffith Act.

The Court did so because it recognized

> "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of wishes of his employees. Congress accomplished this goal by enacting 8(b)(7), which restricts primary recognitional picketing, and by further tightening 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns. Construction unions are fully covered by these sections." Ibid 629

This overriding purpose; the legislative forebearers to 8(e); and the scant contrary statements of legislative history encourages and most certainly does not prohibit, a holding that 8(e) is violated by union signatory contracting restraints.

D.

Connell Revisited

In Connell the general contractor customarily subcontracted all plumbing and mechanical work. It thus hired no employees to perform this work directly and of necessity relied upon both union and nonunion contractors to perform this aspect of a project.

Local 100 desired to organize mechanical contractors who were actual or prospective subcontractors to perform project work on behalf of Connell. The union, in recognition that organizational and recognitional picketing is outlawed, cast

its proposed agreement with prefatory language expressly disclaiming an interest in recognition or in representation of any employee of Connell. It demanded that any subcontractor utilized in the future be signatory to the area collective bargaining agreement with Local 100. Demands were enforced through picketing. This organizational device was calculated to deprive employees of independent employers of their rights under Section 7 of the Act. It was thought to neatly sidestep 8(b)(7) because of the express disclaimer of interest in representation of Connell's employees; to be outside of the ambit of 8(f) in that it was contemplated that no employees would be hired by Connell; and to be free of the prohibitions of 8(b)(4). The Court was unimpressed. Two important guiding principles were distilled:

1. The intent of Congress in both 1947 and again in 1959 was to deprive unions of top-down organizational weapons.

2. Restraints on subcontracting in the construction industry were to be limited to the reason for the passage of the proviso, i.e., those factors which differentiated the construction industry from other industries.

As set forth previously, supra, at p. 29-35, the sole material differentiating factor between the construction industry and other industries is commingling of employees at a common jobsite. However, commingling is not constant. A construction project is completed in stages. These include the excavation stage; the utility installation stage; foundation; iron work, etc. At any one of those stages it may or may not be necessary to have employees of more than one employer commingle. Any clause which prohibits utilization of an employer at times or places where commingling with others is not required, goes well beyond the limited purposes of the congressional grant of immun-

ity. The clause in this case applies to jobsites without regard to whether the contractor intends to employ any employees at that site; it applies without regard to whether employees of the general contractor will be present when the employees of the subcontractor are present at the jobsite; it applies to preclude employers having a collective bargaining agreement with a different union; it leaves open the possibility that an employee of the general contractor will be required to work side-by-side with a nonunion employee performing jurisdictionally different work; and, of course, it fails to preclude a general contractor from acting in the capacity of a subcontractor to a nonunion general, thereby creating a potential for jobsite commingling. The clause thus is overbroad as it applies at times and places where commingling and jobsite friction are not possible. It is also underin-

clusive to the extent that it permits potential for jobsite friction.

To avoid the conclusion that Connell dictates a finding that union signatory clauses are unlawful, the Board recites three contentions:

1. Congress intended to preserve the pattern of bargaining which existed in 1959;

2. Any and all restraints upon subcontracting are lawful if obtained in the context of collective bargaining; and

3. The Connell decision merely fills a gap or loophole 8(b)(7).

1. The Board's "Pattern of Bargaining" Argument is Inconsistent With This Court's Connell Analysis

The Board promotes a simple syllogism:

1. There was a pattern of bargaining in 1959.

2. Congress intended the 1959 amendments to preserve the pattern of bargaining.

3. Therefore, each and every form of restraint upon subcontracting predating 1959 is lawful. Like may syllogisms, the conclusion is only as sound as its minor and major premise.

The minor premise is that there was a pattern of bargaining. As proof, the Board proffered the Lunden Report.[32]

Curiously, in rushing to this conclusion the Board fails to reflect upon at least three impediments. First, the Board's own General Counsel, after conducting a painstaking investigation of the construction industry into the usage of subcontracting clauses in 1959, concluded:

> "* * * Moreover, the study did not deal with the precise issue involved herein, viz., whether and

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[32] "Subcontracting Clauses In Major Contracts" by Leon E. Lunden, pp. 579-586 and 715-723.

> to what extent there existed 'particular union' subcontracting clauses in the construction industry in 1959."
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> Labor Relations Yearbook (1976), p. 308.
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> "In view of the fact that the Lunden study was inconclusive on the instant issue, the Office of the General Counsel undertook its own study of construction industry clauses existing in 1959. * * *"
>
> ibid. pp. 308-309.
>
> "From this review of the contracts existing in 1959, the only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform dominant practice in the industry, it would appear that there was no such pattern. The only 'pattern' that does emerge is that of a mosaic * * *. * * *" (Emphasis Added)
>
> ibid. p. 309.

Second, this Court in Connell rejected the identical argument. It concluded that rather than to constitute an adoption of the common law of bargaining Congress instead intended the proviso to be

a "partial substitute" for an attempt to overrule this Court's decision in NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951).

Third, the argument proves too much. General Counsel has previously acknowledged that agreements of the sort present in Connell were part of the 1959 mosaic. Labor Relations Yearbook (1976), p. 309. He must therefore either urge that Connell be reversed or conclude the hollowness of this argument.

2. Collective Bargaining Relation

The Board, by seizing language out of context from the Connell decision asserts that any and all restraints upon subcontracting if obtained in the context of collective bargaining are lawful.

To support this proposition it quotes the following passage from Connell:

> "* * * Its (the 8(e) proviso) authorization extends only to agreements in the context of collective bargaining relationships and in light of congressional references to the Denver Building Trades problem, possibly to common site relationships in particular jobsites as well." Ibid 633.

The Board reads this phrase in the disjunctive. It thus asserts that all restraints on subcontracting in the context of collective bargaining are lawful. It further urges that even in the total absence of a collective bargaining relationship, that restraints on subcontracting are lawful provided the common situs Denver Building Trades type relationship is present on a specific job site.

The Opinion of this Court, however, cannot be understood by slicing a single sentence from it and totally ignoring the context within which it was presented. It is apparent that this Court meant the phrase to be read in the conjunctive and

that secondary restraints on subcontracting would be construed as lawful only when:

1. They were negotiated in the context of a collective bargaining relationship; and

2. They cured common site friction on particular jobsites.

The statute states merely that "an agreement" pertaining to the construction site is lawful. The Supreme Court has held that some agreements are unlawful even though confined to the construction site. There is no evidence within the structuring of the statute that suggests that agreements in the context of "collective bargaining" are sheltered and those outside of it are not. Nor is the legislative history helpful. Neither Sand Door[33] nor NLRB v. Denver Building & Construction Trades address this

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[33] Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L., et al, v. NLRB, 357 U.S. 93 (1958).

problem. The legislative history can be reviewed in its entirety and there is not one whisper of a legislative intent to distinguish between "stranger" and "collective bargaining" relationships. The statute is thus facially neutral and there is no relevant legislative history to assist.

One might indeed inquire just what a collective bargaining relationship means. The Dictionary of Industrial Relations does not contain it.[34] It does define collective bargaining to denote:

> "* * * the process whereby representatives of labor and management work out the wages, hours and other terms and conditions of employment to be embodied in an agreement that is to govern the relations of the parties for a specified period of time."

It would be fair to assume that such a relationship contemplates that an employer will have a substantial and representative work

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[34] Roberts, Dictionary of Industrial Relations, Revised Edition, Harold Roberts.

force; that the majority of that work force have designated the union as their agent for purposes of collective bargaining; and that the employer and the union bear an obligation, one toward the other, to bargain in good faith with a view toward reaching agreement. This is not, however, what the NLRB has held. Rather, in Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America (Donald Shriver, Inc. and Sullivan-Kelly & Associates), 239 NLRB No. 42 (1978), aff'd 635 F.2d 859 (D.C. Cir. 1980), Topaz was a framing subcontractor. All crafts on the project were "union" except Topaz' employees. They had never been party to any labor contract. The union threatened to picket Topaz if it did not sign a contract with it. When Topaz refused to sign a standard Carpenters Master Labor Agreement, picketing commenced. At no time did the union purport to repre-

sent or in fact represent the majority of Topaz' employees.

The NLRB held that the demand of the union to represent all employees, followed as it was by picketing, constitutes an adequate collective bargaining relationship to grant immunity to the subcontracting clause contained within the proffered collective bargaining agreement.

This conclusion rests on the thinnest of reeds. The holding stands for the proposition that a collective bargaining relationship arises even though the union lacks majority status; it coerced the employer to recognize it and compelled employees to join. Besides the self-evident preposterousness of the proposition, it flies squarely in the face of the Supreme Court's admonition in NLRB v. Iron Workers, Local 103, supra, that 8(f) agreements must be the product of voluntary and not coerced consent. If indeed this kind of relation-

ship can be deemed that of "collective bargaining," it demonstrates and underscores the inadvisability of relying on such a relationship as a predicate to immunizing agreements which are otherwise susceptible of 8(e) liability.

Of course it should be asked why the existence of a collective bargaining relationship is significant. Why should it make a difference? Why should agreements in the construction industry where there is a "collective bargaining relationship" be immune but those in other industries not be immune?

The justification might be articulated in a work preservation frame of reference. In other words, where the intent is to benefit the specific bargaining unit on whose behalf the bargaining is undertaken, the clause should be lawful. But this misses the point. In order that any agreement, be it in the construction industry or

otherwise, fall within the purview of 8(e), there must be a finding that it is the intent of the tainted proviso to benefit those who fall outside the pale of a primary objective. It seems probable that when the Supreme Court in Connell employed the term "collective bargaining relation" it had the primary versus secondary dichotomy announced by prior case law in mind.

It is most difficult to articulate a reason that the existence of a "collective bargaining relationship" should shroud a secondary objective and control the labor policies of neutral employers. Certainly there is nothing in the nature of the construction industry, in this regard, which distinguishes it from any other industry.

Third, the phrase "collective bargaining relation" is a dramatic oversimplification. As may be seen from the broad contractual statement of jurisdiction, Local 701 purports to cover many speciali-

ties. From excavation contractor to crane operator atop a building anything that possesses a button to actuate its mechanism falls within their jurisdictional claim.

The construction industry has developed sophistication. There are a host of speciality subcontractors. The specialities produce efficiency. The general contractor may perform one or more of these specialities, to the extent that it possesses supervisory skill and necessary equipment. The balance of the work is subcontracted.

It is thus not unique to find a general contractor who employs a steady crew of crane operators but who has historically and always delegated excavation and utility work to third parties for want of competence to handle it themselves. Thus the collective bargaining relationship which exists with the unit applies solely to that narrow specialty. It has no application to and

indeed the general contractor has no specific interest in the rate of pay or level of fringe benefits to be negotiated or paid by specialty contractors to their employees. The general contractor is as much a stranger to the collective bargaining relation of the union to those employees as was Connell.

The above demonstrates that it would be inappropriate to hold that the mere existence of a "collective bargaining relationship" legitimizes all union signatory subcontracting restraints.

3. The Purported 8(b)(7) Loophole Furnishes No Support To The Board

The Board postulates that the collective bargaining agreement in Connell was sui generis; that picketing to obtain it would not be interdicted by 8(b)(7); and that therefore this Court crafted an 8(e) remedy.

The premise of this argument is that 8(b)(7) regulates solely primary picketing, i.e., that which is addressed to the relationship of the employer and employee being picketed. The words of 8(b)(7) do not lend support to this contention. The prefatory words to the statute interdict picketing

> "* * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization. * * *"

If it had been the intent to limit the scope of 8(b)(7) to primary picketing, the article "the" would have been used in lieu of "any".

Second, this construction does not comport with common sense. Congress could not have intended to condemn organizational and recognitional picketing in its primary sense but not have granted relief from the effect of the economic leverage of a general contractor, enlisted by the union, to compel

a third party subcontractor to recognize and deal with a labor organization.[35]

Third, the Board has recognized the broad remedial scope of 8(b)(7). For example, the General Counsel's office has interpreted 8(b)(7) to interdict all forms of picketing to achieve a prehire agreement. Such agreements are executed prior to the time that an employer has any employees on its staff. It is then free to choose to hire through the union hall, or alternately, may choose to subcontract the work to a third party.

As the General Counsel's office concluded:

> "* * * Where a construction industry employer has no unit employees or less than a representative complement, and a union pickets to obtain an 8(f) contract, it is our

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[35]This is the obverse side of the 8(b)(4) coin which condemns picketing where the object is to force a neutral not to do business with the primary employer. Here the secondary employer is being deployed as an organizational tool to permit continuation of business relationship.

> view that since a question concerning representation could not be raised and an expedited election could not be held, such picketing would be violative of Section 8(b)(7)(C) from the first day. * * *."
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> Labor Relations Yearbook (1979), p. 354.

The above factors make it reasonable to conclude that 8(b)(7) does provide remedies against secondary as well as primary picketing to obtain an organizational and/or recognitional purpose.

## CONCLUSION

Petitioner respectfully requests the Court to reverse the Court of Appeals decision and to remand to the National Labor Relations Board with instruction to enter an Order declaring the signatory subcontracting

provisions herein to violate Section 8(e) of the National Labor Relations Act.

Respectfully submitted,

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